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In the Supreme Court

OF THE

United States

OCTOBER TERM 1949

No. 489

UNITED STATES SMELTING, REFINING AND MINING COMPANY, a Corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom and WALTER JENSEN,

Petitioners,

vs

EMMA GRACE LOWE,

Respondent.

RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S STATEMENT ON OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

Respondent accepts Petitioners' statement (pages 2

and 3 Petition) setting forth the identity and citations of the opinions below and the statutes involved. Respondent does not question the jurisdiction of this court to grant Certiorari but does contend that there are very definite reasons, which will hereafter more fully appear why the court in the exercise of its discretion should decline to grant the writ in this instance.

RESPONDENT'S STATEMENT OF THE CASE

These two cases (consolidated for trial) are a type of litigation once very common during the heyday of gold mining in the Western United States and Alaska but now becoming increasingly rare. They are contests between rival claimants to placer mining claims located upon the public domain. Although as their counsel state (page 4 Pet.) the petitioners' claims (the L Association and Snow Shoe Fraction) were located as early as 1908 none of the ground was ever mined and no substantial development work had been performed prior to the time Respondent and her associate located a portion of the ground in 1941. Respondent's adverse locations are called the Jupiter Association, Scorpion Association and Saturn. The Jupiter and Scorpion Associations contain approximately 40 acres each and the Saturn 20 acres so that there are only 100 acres involved. The relocations were

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made because respondent believed that the earlier locations had been forfeited and the ground rendered subject to relocation by failure to do the annual assessment work or claim suspension when available during many of the years that had intervened since the original locations. At that time the public records disclosed that during the vast majority of these years there had been no proofs of labor or suspension notices filed upon either claim (See pages 100-101 Tr.). After relocating the ground in dispute Respondent performed the development work required to qualify the claims for patent and commenced patent proceedings. Petitioners filed adverse claims in the land office and commenced these proceedings. Upon the trial in the District Court Petitioners' theory, which they were successful in getting the trial Judge to adopt was that the Waskey Act (48 U.S.C.A. Sec. 384, pages V-VI Appendix Pet.) was implied repealed as a whole by the 1938 Amendment to the 1900 Law. (48 U.S.C.A. 381, pages VII-VIII, III-V Appendix Pet.) In accordance with this theory the Trial Judge ruled out all the evidence offered by Respondent to the effect that proofs of labor and suspension notices had not been filed upon the claims during many of the years intervening prior to 1938 while the Waskey Act was unquestionably in effect, (Exceptions 2 to 4, pages 90 to 102 Tr.) and in effect instructed the Advisory Jury to return a verdict for the petitioners. After the verdict of the Advisory Jury was received the

Trial Judge being in doubt as to the correctness of his rulings requested briefs on the law from counsel for the respective parties which were submitted. After considering the briefs the Judge handed down a detailed written opinion reaffirming his previous conclusions which is reported in 74 Federal Supplement 917. Respondent then appealed to the Circuit Court of Appeals which directed a reversal. The Respondent's contentions in the Circuit Court of Appeals as set out in her statement of points to be relied on, as regards the implied repeal of the Waskey Act, (page 168 Tr.) are as follows:

> "(a) That the Waskey Act was not repealed by the 1938 Amendment to the 1900 Statute because the 1938 Amendment was not a new enactment, making the general mining laws applicable to Alaska, but such provision was merely copied word for word from the Act of 1900 without change, the changes being with regard to entirely different provisions of the law. (mining on tidelands, etc.)
>
> (b) Even if the Waskey Act had been impliedly repealed in 1938 such repeal would not affect the rights and status that had accrued and become vested prior to the repeal, and would in no way revive locations such as the ones involved here that had become void for failure to do the assessment work during the period while the Waskey Act was in force.
>
> (c) Even if the automatic forfeiture provisions of the Waskey Act were impliedly repealed by the 1938 Amendment such implied repeal would not affect the other and separate provisions of the Waskey Act dealing with the filing of proofs of labor and the presumption of non-performance arising from failure to file."

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The Circuit Court of Appeals in its opinion refused to adopt Respondent's proposition (a) and held that the 1938 Amendment had impliedly repealed the automatic forfeiture clause of the Waskey Act. (175 Fed. 2nd at page 489) The Circuit Court of Appeals did, however, approve Respondent's propositions (b) and (c) (175 Fed. 2nd on 489-90) and directed a reversal and the entry of decree in Respondent's favor. Petitioners have now applied to this court for a Writ of Certiorari. Petitioners contend that the rule of law announced by Hammer vs Garfield Mining Company and the many other similar decisions in the Territorial, State and Federal Courts, to the effect that forfeiture is an affirmative defense which must be pleaded by the party relying upon it and must be established by clear and convincing proof, is part of the judicial interpretation of the mining laws of the United States and as such is inconsistent with the burden of proof provisions of Alaska's Waskey Act and impliedly repealed those provisions, when the 1938 Amendment, which as petitioners contend and the Circuit Court of Appeals held impliedly repealed the undoubtedly inconsistent automatic forteiture clause, was enacted (See pages 8 to 13 Pet.). Petitioners state:

> "The Court of Appeals has thus overturned precedents of over fifty years standing." (page 10 Pet.)

Respondent on the other hand contends that Hammer vs Garfield Mining Company and that many federal and

state cases which announce the same doctrine merely affirm a rule of pleading and proof which has always been the law and has its basis not in any of the provisions of the mining code but rather in the traditional reluctance of the courts to enforce forfeitures. This rule requiring that a forfeiture be set up as an affirmative defense and established by clear and convincing proof is not only not inconsistent with but has no particular connection with proof of labor statutes such as Alaska's Waskey Act and the similar statutes in force in various of the states, including specifically New Mexico, Idaho and now Oregon, which give evidentiary effect to the filing or failure to file proofs of labor and provide in certain cases, that if the proofs of labor are not filed the primary burden of proof is shifted. The Waskey Act and similar statutes merely afford a means by which the primary burden of proof, imposed by Hammer vs Garfield Mining Company and similar cases may be met by the party having it under certain circumstances. Not only have no precedents been overturned by the ruling of the Circuit Court of Appeals on this point, but on the contrary had the Circuit Court adopted petitioners theory, it would have wiped out not only these provisions of the Waskey Act but automatically and ipso facto the similar statutes of Idaho, New Mexico and Oregon as well. Respondent, therefore, submits that no prior precedents have been overturned, and no new, novel or important questions of

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law are involved but the Circuit Court of Appeals has merely followed and given effect to the plain provisions of an Alaska statute of long standing, which happens to be substantially identical to similar statutes in force in at least three states, and which have been recognized as valid and enforced by the Courts of those states for many years.

Petitioners also contend that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision in directing that the cases be remanded with instructions to enter judgment for the Respondent (taking any incidental proof that may be required to establish the validity of her own locations) instead of directing a new trial as Petitioners desire. In connection with this Respondent points out that the trial of this case in the District Court consumed eight days (pages 87-88 Tr.). Petitioners had a full opportunity at that time to submit all evidence they had. Petitioners' counsel deliberately led the Trial Judge into an erroneous theory in direct contravention of the plain terms of an express statute, the Waskey Act. They chose to ignore that statute upon the theory that all of its provisions had been impliedly repealed. There has already been spent in court costs and attorney's fees in this case almost as much as the ground involved is worth. It would be a

real hardship, in fact a calamity to the Respondent with her limited means to be required to go back and now undergo another protracted trial with the prospect of a possible further appeal to the Circuit Court of Appeals and perhaps to this court before the matter was completed. There must be an end to litigation. Respondent submits that on neither ground is the discretionary remedy of certiorari justified in this case and that to grant it would cause great hardship upon the Respondent.

A further reason exists why it would appear useless to grant certiorari in this instance and that is, that assuming the correctness of petitioners' contention which was approved by the Circuit Court of Appeals that the 1938 Amendment to the 1900 law ipso facto wiped out all intervening statutes contrary to or conflicting with the general mining laws, petitioners could not in the end, under any circumstances, prevail. If, as petitioners contend and the Circuit Court of Appeals held the 1938 Amendment restored the general mining laws in full force in Alaska and wiped out all intermediate acts such as the automatic forfeiture clause of Alaska's Waskey Act that were at variance with the general mining laws, then it is apparent that the District Court itself had no jurisdiction over these suits because they were commenced too late and the only final result would be a dismissal for want of jurisdiction, which would, of course, have the same effect as a

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decree sustaining respondent's claims as directed by the Circuit Court of Appeals. These several matters will be discussed under appropriate sub-heads in the portions of this brief which follow.

ANSWER TO PETITIONERS' FIRST POINT—THERE IS NO CONFLICT BETWEEN HAMMER vs GARFIELD MINING COMPANY AND SIMILAR DECISIONS AND THE RULING OF THE CIRCUIT COURT OF APPEALS IN THIS CASE.

Petitioners' argument on this point (Pages 8 to 11 Pet.) is predicated upon a misconception of the holding in Hammer vs Garfield Mining Company and the many other decisions, both state and federal, which announce the same ruling. What these cases hold and all that they hold is that forfeitures are not favored by the law and that forfeiture is accordingly an affirmative defense which must be specially pleaded and then established by clear and convincing proof. The holding in these cases is predicated, incidentally, as we will show in our discussion of petitioners' next point, not upon any interpretation of the Federal Mining Laws but upon principles of practice which long antedate the mining code. They are based upon the traditional hostility of the Courts to forfeitures. These cases are good law. They represent the rule in ju-

risdictions having proof of labor statutes like Alaska's Waskey Act as well as in states that do not. There are now at least three states which to our knowledge have proof of labor statutes substantially identical with these provisions of Alaska's Waskey Act. Those states are New Mexico, Idaho and Oregon. In all of those states the doctrine of the Hammer case is fully recognized. The Circuit Court of Appeals for the Ninth Circuit in the case of Cache Creeek Mining Company vs Brahenberg, 217 Fed. 240 on 241 recognizes the rule in the following language:

> "A forfeiture must be set up before it can be insisted upon." Citing Bishop vs Baisley, 28 Ore. 119, 21 Pac. 936.

This case was an appeal from Alaska decided in 1914, seven years after the Waskey Act went into effect there. As previously stated all these authorities merely announce the rule that forfeiture is an affirmative defense and that the burden is upon the party claiming the forfeiture to allege and prove it. But although they establish that forfeiture is an affirmative defense which must be pleaded and proved and accordingly the party alleging forfeiture has the primary burden of proof to establish it; they do not in any way suggest how the party having that burden shall sustain it or that the initial burden of proof may not, in a proper case, and on a showing of appropriate facts *be shifted.* In a brief of this kind it is

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undesirable to go into any elaborate technical discussion or finespun distinctions but it is well established that the original burden of proof or as it should perhaps more accurately be called the burden of going forward with evidence, frequently shifts during the course of the trial. See 20 Am. Jur. Title Evidence, Sections 132 and 133, pages 134 to 136, 31 C.J.S. Title "Evidence", Sections 110 and 111, pages 718 to 720. This is precisely the effect of such statutes as Alaska's Waskey Act and the similar statutes in force in the states of New Mexico, Idaho and now Oregon. They shift the burden of proof. The Waskey Act states (page VI Appendix to Petition) "Such affidavit shall be prima facie evidence of the performance of such labor or making of such improvements, but if such affidavit is not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual labor and improvements". There is nothing particularly novel or unusual in principle, about such a law.

If space permitted many statutes could be pointed out where the failure to file formal evidence of the performance of a certain act is made prima facie evidence that the act was not done or in other words, shifts the burden of proof upon the party to show that it was done. As previously stated, forfeiture is an affirmative defense and the burden is upon the person alleging it to prove it. That

proof can ordinarily be accomplished in one of two ways. First, by affirmative testimony to the effect that the annual labor was not done or, secondly, by a showing of facts from which the law will presume hat it was not done or which will shift the burden of proof upon the adverse party to show that it was done. Such is the effect of the Waskey Act and similar laws. Upon checking the codes of the states which have similar statutes it would appear that the statute most closely approximating this phase of the Waskey Act is the New Mexico proof of labor law. The Idaho and Oregon statutes state in substance:

> "The failure to file such affidavit within said time will be considered prima facie evidence that such labor has not been done." (Section 108-215 O.C.L.A. Idaho Statute quoted page 2480 Lindley on Mines, 3rd Edition, Volume 3)

The New Mexico Law (See 89 Pac. page 287 and Volume 3, Lindley on Mines, 3rd Edition, page 2314) states:

> "The failure to make and file such affidavit as herein provided ******* throws the burden of proof upon the owner or owners of such claim to show that such work has been done according to law."

At the time the Waskey Act was adopted in Alaska (March 2, 1907) there were apparently only two states, New Mexico and Idaho, which had this kind of law. Since the wording of the Idaho statute as above mentioned is different the conclusion seems inescapable that the Was-

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key act was copied from New Mexico. The Supreme Court of New Mexico in the early case of Upton vs Santa Rita Mining Company (14 New Mexico 96, 89 Pac. 275 on pages 287 et seq.) construed the New Mexico Act and held that it shifted the burden of proof precisely as we are contending here.

> "This statute is unusual; New Mexico and Idaho being, as pointed out by Mr. Lindley (Lindley on Mines (2nd Ed) 636), apparently the only jurisdictions having such a law. As is said by the very thorough author: '*Ordinarily, the burden of proof rests with the party charging a forfeiture to show that the work has not been performed by the previous locator. In Idaho and New Mexico, where there is a failure to file the proof of annual labor, it would seem that this rule is modified and the burden is shifted.* We cannot see any objection to this class of state legislation. The several states have a right to define the nature, degree and effect of evidence within reasonable lines, and we do not think these provisions unreasonable.'
>
> "In this case the proof shows that the holder of the Pinder claim made and filed an alleged proof of labor for 1897. But this, when tendered in evidence, was, upon objection, rejected by the Court as not made in conformity with section 2315, Rev. St. U.S. (U.S. Comp, St. 1901, p. 1421). A comparison of it with the statute convinces us that the court below was correct in so holding. Indeed, that ruling is not questioned here. In legal effect, therefore there was a failure by the owner of the claim to make and file the statutory proof, *and this under the statute, threw upon it, and not upon plaintiff, the burden of proving that 'such work had been done according to law'* *** Had the defendant complied with the statute as to making its proof of labor, it would probably have

> been entitled to this instruction; but its failure to take this very simple precaution for the protection of its rights imposed upon it, and not upon its adversary, the burden of proof." (287-8)

This phase of the matter is admirably summed up by the Circuit Court of Appeals in footnote 6, page 489, 175 Fed. 2nd:

> "Many of the Western states have statutes providing for the recording of proofs of labor. At least two of these statutes, those of Idaho and New Mexico, Sec. 47-606, Idaho Code; Compiled Laws of New Mexico 1897, paragraph 2315, contain virtually the same provisions as those of the Waskey Act relative to the shifting of the burden of proof. If these local enactments are inconsistent with the paramount mining laws of Congress they could hardly have escaped condemnation during the many decades they have been on the books, yet so far as we are advised that validty has never been successfully challenged. In discussing the Idaho and New Mexico statutes Lindley has expressed the view that this class of state legislation is unobjectionable. "The several states," he observes, "have a right to define the nature, degree, and effect of evidence, within rational limits, and we do not think these provisions unreasonable." Lindley on Mines, 3d Ed., paragraph 636, p. 1383."

To summarize, there is no inconsistency or conflict whatever between this proof of labor clause in the Waskey Act and the case of Hammer vs Garfield Mining Company and the others which announce the doctrine that forfeiture must be affirmatively pleaded and proved by the party asserting it. The Hammer and other cases mere-

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ly announce a rule, universally recognized, of primary pleading and practice. The Waskey Act and similar statutes provide a means by which proofs of labor may be given evidentiary effect if timely filed and makes the failure to file them evidence that the work was not done or, in other words, shifts the burden of proof over to the claimant to show that the work was done.

As regards the observations contained on page 10 of the Petition, to the effect that the old time sourdoughs are nomad types and rapidly dying off so that the person that has the burden of proving that annual labor was or was not done twenty, thirty or forty years ago has a particularly difficult task, we may say that the Waskey Act has been on the books in Alaska since 1907 and was designed to overcome this very difficulty. The primary purpose of statutes such as this provision of the Waskey Act is to afford a convenient means of preserving evidence that the annual assessment work was done. It is to be borne in mind that the general mining law themselves make no provision for the filing of proofs of labor and give such proofs of labor when filed no evidentiary effect. The Waskey Act and similar state laws provide that when proofs of labor are filed they are prima facie evidence of the facts therein setforth. It seems obvious, incidentally, that if the States could lawfully legislate upon such a subject and give to proofs of labor prima facie

evidentiary effect if filed, they could also lawfully provide that failure to file would have the reverse effect; that is, be prima facie evidence that the work was not done or, stated otherwise, shift the burden upon the claimant to show that it was. Petitioners themselves in this very case availed themselves of the favorable evidentiary effect of filing proofs of labor for certain years, (see exception No. 8 pages 116 to 131 Tr.) while vigorously opposing the adverse evidentiary effect of failure to file for other years.

All the claimant needs to do is comply with the quite simple provisions of the Waskey Act and record his proof of labor or suspension notice each year and the difficulty which petitioners apprehend in proving performance of annual labor is automatically eliminated. Having such a statute available, which provides such a simple and ready means of affording evidence that the assessment work is done, when it is performed, it seems no more than just that the statute should likewise declare as does the Waskey Act that if the recording is not complied with, the presumption should be that the work has not been done and the burden shifted upon the claimant to show that it was. What is sauce for the goose is sauce for the gander. Petitioner, United States Smelting, Mining & Refining Company, with its extensive legal staff must have realized when it purchased this ground, the deficiencies in its

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chain of title, and the fact that proofs of labor and suspension notices were not recorded for many years intervening since the claims were located. They were, accordingly, fully aware from the outset of the difficulties with which they would be confronted when their title was questioned.

RESPONDENT'S ANSWER TO PETITIONERS' SECOND POINT—THE DECISION IN HAMMER VS. GARFIELD MINING COMPANY IS NOT BASED UPON ANY INTERPRETATION OF THE FEDERAL MINING LAWS.

It will be obvious to anyone reading the decision of Hammer vs Garfield Mining Company and considering it in connection with the Federal Mining Laws that that decision is not and cannot be based upon an interpretation of any provision in those laws. There is absolutely nothing in the Federal Mining Laws themselves which in any way attempts to legislate upon where the burden of proof lies in the event of forfeiture. Sec. 2324 Rev. Statutes (30 U. S. Code Annotated 28) merely states:

> "And upon a failure to comply with these conditions, the claim or mine upon which such failure ocurred shall be open to relocation in the same manner as if no location of the same had ever been made, etc." (pages I and II App. to Petition)."

Obviously there is nothing here or in any of the other provisions of the mining law itself upon which to base an interpretation as to where the burden of proof rested in the event of forfeiture. The Hammer case itself, the entire applicable portion of the decision of which is quoted at pages 11 and 12 Petition, does not indicate the basis for the decision. Other cases, however, announcing the same rule clearly show the reasoning upon which it is predicated. We have already cited and quoted from the early Oregon case of Bishop vs Baisley. Similar statements will be found in many of the authorities cited by petitioners.

> "It is a settled law that equity favors neither forfeitures nor penalties." (From Willitt vs Baker, 133 Fed. 937 on 946. Cited page 9 Pet.):
>
> "*Forfeitures, however, are not as a general rule favored by the law.* A forfeiture of the mining claim cannot be estatblished except upon clear and convincing proof of the failure of the owners of the claim to have the work done or improvements made to the amount required by law." (From Justice Mining Company vs Barkley, 82 Fed. 354 on 359. Cited page 9 Pet.)
>
> "*The courts are reluctant to enforce a forfeiture, deeming this class of penalties odious in law;* and it is well settled by decisions that forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have performed the labor to the amount required by law, the burden of proving which rests upon the party asserting it." (From Emerson vs McWhirter (Calif.) 65 Pac. 1036 on 1038. Cited page 10 Pet.)

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The text writers uniformly give the same reason for the rule. The following quotation is from Snyder on Mines, Volume 1, Section 554, page 503:

> "Since it is axiomatic that forfeitures are odious to the law, and for that reason are not countenanced or favored by the courts, all doubtful cases will be construed against the forfeiture. But while this is true, the law exacts a faithful compliance with the conditions required. Yet the burden of proving a forfeiture falls upon the person alleging it, and it is always a question of fact for the jury whether a mining claim had been abandoned or forfeited prior to relocation."

Lindley, of course, discusses the matter in even more detail. Lindley on Mines, 3rd Edition, Volume II, Section 645 is cited by the Circuit Court of Appeals in its opinion in support of the following statement:

> "This rule is not declared by the statute but is merely expressive of the traditional hostility of the law toward the enforcement of penalties and forfeitures." (175 Fed. 2nd, pages 487-8)

We direct attention particularly to the following:

> "The Courts do not incline to the enforcement of this class of penalties, which have always been deemed in law odious.' (Lindley Third Edition, Sec. 645 page 1607)

In a previous section Lindley has some critical things to say regarding the extent to which the Courts have gone in their reluctance to enforce this type of forfeiture:

> There is probably no single provision of the law which is evaded to a greater extent than this one is. While, of course, there are many exceptions, the average locator will exhaust his ingenuity in attempting to avoid this plain and wholesome requirement. The Courts are disposed to deal with these drones in the hive with much more leniency than they deserve. The statute is too frequently applied on sentimental lines. Forfeitures, say these tribunals, are odious, and in many cases the reluctance with which they enforce the law encourages, rather than deters, the systematic evasion of it." (Lindley on Mines, Third Edition, Sec. 624, Pages 1532-3)

The above should be ample to establish the already self-evident proposition that the decision in the case of Hammer vs Garfield Mining Company was not predicated upon any construction or interpretation of the mining law itself but rather upon the traditional hostility of the Courts to forfeitures and the reluctance of the Courts to enforce the forfeiture, not only of a mining claim but of any estate, which hostility of course is entirely independent of and long antedated the Federal Mining Laws. Courts are reluctant to enforce all forfeitures and they approach the forfeiture of mining claims with this traditional reluctance. Forfeiture of a mining claim is an affirmative defense and must be established by clear and convincing evidence, not because it is a mining claim, but because all forfeitures must be so established.

It is quite true this Court in the subsequent case of El Paso Brick Company vs McKnight, 233 U. S. 250 on

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259-60 used the language quoted on page 12 of the petition.

In doing so, however, it is quite clear that the Court was merely paraphrasing the contentions of the appellant on this point and expressing no opinion as to whether those contentions were correct or not. This is, of course, obvious in the opening clause of the quotation which states "this conclusion makes it unnecessary to decide the question." The case had already been reversed on entirely different grounds which rendered unnecessary the consideration of this point. It is indeed rather startling that a statement in a Court's decision, declining to pass upon a certain point, should be cited as authority, as it has been here, for the very proposition which the Court refused to decide. The decision of the lower Court in the case of McKnight vs El Paso Brick Company from which the appeal to this court was taken (16 New Mexico 721, 120 Pac. 694)clearly, and we believe correctly, bases the ground for decision upon the terms of the local statute and not upon any construction of the Federal Mining Laws. We quote from the opinion:

> "Counsel for appellants say that there was no obligation of any character upon the appellee to show that appellant had not filed such an affidavit; that the statute in substance is that the burden shall be upon the owner, unless he files such an affidavit, and in order to escape such a burden he may show, there-

fore, that he has filed such affidavit. And that if when he offers such affidavit in evidence the opposing party can see that it does not comply with the statute and that, therefore, it may be excluded, he has then to object to its introduction. In other words it is the position of the counsel for appellant that the appellee should have introduced evidence showing a failure to do the annual labor, and if he was able to produce clear and convincing proof of the failure of the appellant to have the annual work done, often times a matter of great difficulty, then the appellant would have been put to proof, and then if he offered the affidavit the appellee could have objected. *No court we take it would sanction such a waste of time to do an unnecessary thing.* The attorney for the appellee knew that the appellant had not filed the statutory afidavit. It was his duty to establish that fact first, and to that he was compelled to put the record in evidence and the records contained the faulty affidavit.*******

We think that there was an obligation upon the appellee to show that the appellant had not filed such an affidavit. The statute is one of convenience. If the owner will not file the affidavit, *it places upon him the burden of showing that he has complied with the law,* such compliance being necessary to the maintenance of his estate, and the facts proving the same being peculiarly within his own knowledge and easier far for him to show their existence, if they did exist, than it would be upon the other party to show their non-existence." (120 Pac. 701)

It is perhaps of some importance in showing that the point involved here is not one of common or general interest to mention that although more than twenty five years have elapsed since the case of El Paso Brick Company vs McKnight came before this court and in spite of

the fact that as above shown not only Alaska's Waskey Act but the statutes of Idaho and now Oregon as well contained substantially identical provisions with the New Mexico law then under discussion no other case has arisen during the interval where the validity and alleged conflict of these statutes with the Federal Mining Laws has been urged. The matter is not one of general interest but of importance only to an increasingly small group, those locating and holding mining claims upon the public domain.

It is, however, entirely correct that if petitioners contentions were sustained and this provision of the Waskey Act declared impliedly repealed because of its alleged repugnance to the general mining laws as interpreted in Hammer vs Garfield Mining Company then not only would the Waskey Act provisions be wiped out but the similar statutes in Idaho, New Mexico and Oregon would also automatically be nullified. Indeed, since there would seem to be no difference in principle between a statute declaring that failure to file a proof of labor was prima facie evidence that the work was not done and a statute that said that filing a proof of labor was prima facie evidence that it was, it would seem that all the proofs of labor statutes in the many states that have enacted them would be wiped out.

It is believed that this Court will be slow to bring about

such a result particularly when neither the provisions of the general mining laws nor any prior decision in any way requires it.

RESPONDENT'S ANSWER TO PETITIONER'S THIRD POINT—THERE MUST BE AN END TO LITIGATION.

As previously stated, the Waskey Act has been in force in Alaska since 1907. The validity of these proof of labor provisions had never been questioned prior to the trial of the present cases. The Honorable Harry G. Pratt, the District Judge before whom these cases were tried, had in a previous case of Koprivica vs Sather, 10 Alaska Reports 593, ruled that the automatic forfeiture clause of the Waskey Act had been impliedly repealed but at that time he expressly recognized the proof of labor provisions of the Act to be still in force. We quote from the opinion in that case:

> "Consequently when the act of May 31, 1938 repeated the wording of Section 26 as passed June 6th, 1900, and left out ony reference to the Waskey Act, it seems clear that Congress intended to make the general mining laws as they existed in 1938 control in Alaska over the Waskey Act *as to matters in which the two laws conflict, i.e.*, as to the resumption of work after the failure to do annual labor. *The other provisions of the Waskey Act still remain in full force.*" (Pages 597-8)

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The experienced and able counsel for petitioners well knew that under the express provisions of this statute the burden of proof would be shifted upon them to prove that the annual labor had been performed as to those years for which no proofs of labor or suspension notices were filed. Instead of attempting to meet this burden they advanced and succeeded in getting the trial Judge to adopt the novel and unsupported theory that these proof of labor provisions of the Waskey Act had been impliedly repealed in 1938 along with the automatic forfeiture clause. This theory as stated was wholly unsupported by any prior decision and was in fact contrary to the previous ruling of the same Trial Judge in Koprivica vs Sather. By so doing petitioners' counsel deliberately put their case in hazard. As pointed out by the majority opinion of the Circuit Court of Appeals on this point, this is quite simply a case where a party, having by express statute the burden of proof upon a certain issue, deliberately failed and refused to discharge that burden, relying upon an erroneous conception of the law which was not caused by any prior decision of the court but was purely of his own making. Under the record as it appeared here there was a complete failure of proof on the part of the petitioners, as regards these years upon which the statute cast the burden of proof upon them. As stated by the Circuit Court of Appeals:

> "In this state of the proof the District Court was obliged to find for the appellant." (175 Fed. 2nd 490)

The cases should have terminated by a judgment in respondent's favor upon a directed verdict. We direct attention to the following quotations from 5 C. J. S. Title Appeal and Error:

> "Substantially the same is the rule, confirmed by statute in some jurisdictions, that the Appellate Court will render or order the proper judgment for defendant or against plaintiff, where the Trial Court should have sustained a demurrer to plaintiff's evidence or should have, under the evidence, directed a verdict or given a peremptory instruction for defendant." (Section 1927, p. 1435)
>
> "The rule permitting the Appellate Court to order or direct a dismissal or non-suit is especially applicable where the lower court should have entered an order of dismissal or non-suit." (Sec. 1928, p. 1437)

Identical statements will be found in 4 C. J. at pages 1189 and 1190. While petitioners do not raise the point it may perhaps be well to point out that although tried with an advisory jury, these were equity suits, not actions at law. There is accordingly no prohibition upon the court under the Seventh Amendment to the Federal Constitution as construed in the case of Slocom vs New York Life Insurance Co. (228 U. S. 364, 33 S. C. 523) against rendering a final decree.

It seems to us that the error into which Judge Pope

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falls in his dissenting opinion on petition for rehearing is in concluding as he does in the opening portions (176 Fed. 2nd 813):

> "We have just finished deciding, now for the first time, an important question of property law for Alaska. It is a matter which previously has been in doubt, and I do not think the appellee should be forever foreclosed from showing, if it can, that the claims were represented, merely because its attorneys took too advanced a position on the former trial."

This statement, it is submitted, finds no support in the record. The Waskey Act, as previously stated, has been the law of Alaska and recognized there since 1907. The act expressly directs in so many words upon whom the burden of proof shall rest if the proofs of labor are not filed. There can be no doubt or ambiguity as to the terms of the statute. Petitioners counsel advanced and elected to rely upon the novel and unsupported theory that this provision of the Act had been impliedly repealed along with the rest in 1938.

It appears to us and we most respectfully submit that respondent has already been sufficiently penalized as a result of petitioners acts through having to incur the expense and delay of an appeal to the Circuit Court of Appeals for the purpose of correcting the error. If she is obliged to incur the further expense and delay of an appeal to this Court and then a retrial in the District Court

with the prospect of still further appeals she will, regardless of the ultimate outcome for all practical purposes have lost the case. We stated in our briefs in the Circuit Court of Appeals and repeat here; the one advantage which a large organization enjoys in litigation against a private individual is that to the organization expense and delay may mean little, while to the individual they are frequently everything. While we are certainly making no bid for sympathy from this Court on that account respondent is a rivate individual with limited means. She is not a multi-million dollar corporation like the principal petitioner, United States Smelting, Refining & Mining Company. As previously pointed out the trial in the Court below consumed eight days (August 6 to 15, 1947). Petitioners and their counsel had ample opportunity at that time to submit further proof if they so desired. As will be apparent from the record, the trial of these cases in the District Court and the expense of the appeal to the Circuit Court of Appeals has already been a severe burden upon the Respondent. If we now add to that the further expense and delay of an appeal to this Court followed by a further protracted trial in the District Court, with as previously stated prospects of further appeals, we will have reached the situation where the expense of the litigation will amount to much more than any conceivable value which the small amount of land (100 acres) involved in these cases could have.

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In addition it may be pointed out that Congress has definitely indicated that the moratorium on assessment work on mining claims will not be extended beyond the last fiscal year. The filing of adverse claims and the pendency of the adverse suits do not, of course, suspend the assessment work requirement. If certiorari is granted and this matter goes up on appeal to this Court, Respondent will be obliged in order to keep her claims in force under Alaska law, to spend $500.00 for annual labor and assessment work between now and July 1, 1950. This expenditure will be of necessity a dead loss because with the claims tied up in litigation she cannot sell them or enter into any real program for their development. It is submitted that there must be an end to litigation. A litigant merely because it happens to occupy a position where expense and delay are of small moment should not be permitted to wear out the opposition to the point where a meritorious cause perhaps has to be abandoned through sheer exhaustion of financial resources. Courts should be a means of administering speedy justice, not an endurance contest.

ADDITIONAL REASON WHY CERTIORARI SHOULD BE DENIED—PETITIONERS CANNOT ULTIMATELY PREVAIL ON THE MERITS IN THIS CASE.

There is still another reason why it is submitted cer-

teriorari should be denied in this case. That is because, under their own theory petitioners could not hope to ultimately prevail on the merits. One of petitioners contentions in the District Court, and to this extent they were sustained by the Circuit Court of Appeals, was that the automatic forfeiture clause of the Waskey Act was implied repealed with the re-enactment of the General Mining Laws as applied to the territory of Alaska in 1938. In this we think both the District Court and the Circuit Court of Appeals erred because the 1938 amendment was not a new enactment (page VII, Appendix to Pet.) on the subject; extending the mining laws of the United States to the Terirtory of Alaska. This provision of the 1938 Act was copied word for word from the original 1900 law; the changes being in regard to other provisions of the law (Mining on tidelands, etc.). It is our belief that under well established principles of law which were submitted in Appellant's Opening and Reply Briefs to the Circuit Court of Appeals the amendatory act is not to be deemed a new enactment so as to wipe out intermediate Acts such as the Waskey Act which have modified or enlarged the original law. We will urge this matter at the proper time in this Court, should certiorari be granted, but for present purposes, let us assume that petitioners position is correct. The implied repeal of the automatic forfeiture clause of the Waskey Act is pred-

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icated upon the fact that it is inconsistent and at variance with the doctrine of resumption of work in the general mining laws. In other words it is petitioners position, which the Circuit Court of Appeals sustained, that all intermediate enactments conflicting or inconsistent with the General Mining Laws were automatically wiped out by the 1938 amendment. But the Waskey Act is only one of a series of special mining laws applicable to Alaska which modify or conflict with the General Mining Laws to a greater or lesser extent. We will now direct attention to one of the others. The Waskey Act is Title 48, Section 384, U.S.C.A. Section 385 provides for the filing fees on proofs of labor and the next Section Title 48, Section 386 passed in 1910 extends the time for filing adverse claims in Alaska until eight months after the close of the sixty day period of publication and the time for filing adverse suits until sixty days after the adverse claim is filed in the Land Office. Under the General Mining Laws Title 30,, Sections 29 and 30, and adverse claim must be filed during the period of publication and the adverse suit within thirty days thereafter. Accordingly, assuming that petitioners and the Circuit Court of Appeals are right, and the 1938 Amendment wiped out everything in conflict with the General Mining Laws enacted prior to that date *then these cases were commenced too late and the lower Court never had jurisdiction to hear them in the first place.* See Lindley on Mines, Third

Edition, Volume III, Section 756, pages 1850-1. Little vs Morris (Idaho) 284 Pac. 1029. Steeves vs Carson, 42 Fed. 821. The record affirmatively discloses (pages 4, 5, 8, 9 and 10 Tr.) that petitioners did not file their adverse claims in the Land Office or commence these suits until long after the period required by the General Mining Laws. The notice of application for patent was published from June 5 to August 3, 1945, the adverse claims were filed on March 29, 1946 and these suits were not commenced until May 27, 1946.

Of course, Respondent did not raise this point in the District Court. Under her theory of the law the actions were timely brought because she did not acquiesce in this doctrine of implied repeal. However, if it be determined that she was in error on this point and the decision of the District Court and the Circuit Court of Appeals holding that the automatic forfeiture clause of the Waskey Act was impliedly repealed by the 1938 Amedment stands, then it must follow as of course that Section 386, Title 48 was also and ipso facto impliedly repealed, and Respondent will raise the point at the first opportunity, as she would obviously be entitled to do under the circumstances. It, therefore, seems clear that if this Court were to grant certiorari and Petitioners were to prevail in their contentions the ultimate result would still be a dismissal of these suits for want of jurisdiction because

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not timely brought. This of course in legal effect would be the same as a judgment in Respondent's favor.

CONCLUSION.

In conclusion it is, therefore, respectfully submitted that certiorari should be denied; first, because there are no conflicting decisions or novel and important points of law to be settled; second, because granting it would work a great hardship and injustice upon the Respondent and, third, because it could in the long run in any event result in no benefit to the Petitioners.

Respectfully submitted,

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